No. 90-1102

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT E. GIBSON,

*Petitioner,*

*v.*

THE FLORIDA BAR, *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITIONER'S SUPPLEMENTAL BRIEF

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October 10, 1991

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## PETITIONER'S SUPPLEMENTAL BRIEF

On September 10, 1991, after petitioner Robert E. Gibson's Reply Brief had been filed, petitioner's counsel received Respondents' Supplemental Brief calling this Court's attention to the decision in *Florida Bar Re Frankel*, No. 76,853 (Fla. June 13, 1991) (reproduced in the Appendix to Respondents' Supplemental Brief ("Supp. App.")). Pursuant to Supreme Court Rule 25.5, this supplemental brief responds to the arguments of respondents Florida Bar and its Board of Governors ("the Bar") that *Frankel* has a significant impact on two of the questions presented in this case.[1]

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[1] Respondents' Supplemental Brief does not claim that *Frankel* affects the question of whether Mr. Gibson was erroneously denied a trial as to the refund that he is due for past unconstitutional use of his compulsory bar dues. *See* Petitioner's Brief at 22-26; Reply Brief at 18-20.

## I. THIS COURT SHOULD CONSIDER THE BAR'S PROCEDURE AS IT WAS APPROVED BY THE DISTRICT COURT AND COURT OF APPEALS

In *Frankel*, the Florida Supreme Court held that, as a matter of state law, the Bar has no authority to use any member's dues for "lobbying activities" which objecting members may not constitutionally be compelled to support under *Keller v. State Bar*, 110 S. Ct. 2228 (1990). Supp. App. 5-7, 11-12. The Bar argues that, because it will not budget for constitutionally nonchargeable purposes after *Frankel*, neither advance reduction of dues nor a general objection serves any purpose. The Bar therefore concludes that its objection procedures are not constitutionally inadequate for failing to provide those procedural safeguards required by *Teachers Local 1 v. Hudson*, 475 U.S. 292 (1986), and *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). *See* Respondents' Supp. Brief at 3-4.

However, prior to *Frankel*, the Bar budgeted and spent dues under the assumption that state law permitted it to spend compulsory dues for lobbying activities which objecting nonmembers could not constitutionally be compelled to support under *Keller*, and that it met federal constitutional requirements by adopting the rebate scheme approved by the district court and court of appeals in this case. *See* Respondents' Brief at 1, 7-8; Frankel *Amici* Brief 39a-41a, 49a. Mr. Gibson has been compelled to pay dues for four fiscal years under that scheme, which was approved by the Florida Supreme Court on June 2, 1988. Joint Appendix ("J.A.") 48.[2] Therefore, as in *Hudson*, 475 U.S. at 305 n.14, this Court should "consider the procedure as it was presented to the District Court," not just for the reasons stated in *Hudson*, but also because Mr. Gibson's rights to freedom of speech and association and first-amendment due process were violated by that scheme during the lengthy period before it was affected by the decision in *Frankel*.

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[2] Dues are payable in full on or before July 1 of each year. Fla. Stat. Ann., Rules Regulating the Bar, Rule 1-7.3 (West Supp. 1990).



## II. EVEN AFTER *FRANKEL*, THE BAR'S REBATE SCHEME DOES NOT SATISFY THE MINIMUM REQUIREMENTS OF FIRST-AMENDMENT DUE PROCESS

*Frankel* only prohibits the Bar from spending compulsory bar dues as a matter of state law for certain "*lobbying* activities." Supp. App. at 11-12 (emphasis added). However, the federal constitutional prohibition is "not limited to legislative expenditures," as Respondents' Brief at 4 n.2 concedes. In *Keller*, this Court held that the first amendment to the United States Constitution does not permit the collection of compulsory bar dues for any "*ideological* activities not 'germane' to the purpose for which compelled association was justified," *i.e.*, "the State's interest in regulating the legal profession and improving the quality of legal services." 110 S. Ct. at 2236 (emphasis added). The activities at issue in *Keller* included not only lobbying, but also filing of amicus briefs, debating and adopting resolutions on issues of current interest at an annual conference, and education programs. *See id.* at 2231. *Cf. Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1961, 1963-64, 1977-80 (1991) (nonunion public employees' compulsory agency-shop fees cannot constitutionally be used for "promoting employee rights or unionism generally," "extra-unit litigation," and "public-relations activities").

Thus, *Frankel* does not provide a constitutionally sufficient answer to the issues presented by Mr. Gibson. His claim is against the use of his compulsory dues for *all* constitutionally nonchargeable activities, not just lobbying. *See* Reply Brief at 18. The Bar's budget categories for, *e.g.*, its publications, "Public Information," and "Public Interest Programs" almost certainly include expenditures that are not chargeable under *Keller*, but are under *Frankel*. *See* Respondents' Brief at 7. Therefore, even if advance reduction and general objections served no purpose with regard to the lobbying activities which the Bar cannot include in calculating any member's dues, those procedural safeguards would still be required by the first amendment to protect the rights of members who, like Mr. Gibson, also object to the Bar's constitutionally nonchargeable activities *other than lobbying*.

Moreover, even assuming that *Frankel* prohibits the Bar from using *all* members' dues for *all* activities that are constitutionally nonchargeable under *Keller*, the issues presented here are not avoided. First-amendment due process would still require an independently verified calculation of the constitutionally chargeable dues amount, adequate pre-collection disclosure to all members of the basis for that amount, and that general objections must be permitted. The Bar's objection scheme, even as affected by *Frankel*, does not satisfy those requirements.[3]

First, if all dues are as a matter of state law limited to the constitutionally chargeable amount, then the calculation of the amount of the dues *is* an "advance reduction." However, *Hudson*, 475 U.S. at 309 (emphasis added), requires an "*appropriately justified* advance reduction." The Bar's self-serving, unverified calculation, based on a projected budget consisting of broad categories of expenses which conceal both chargeable and nonchargeable expenses, *see* Respondents' Brief at 7, is not appropriately justified.

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[3] That dissenters may challenge the Bar's decisions to take legislative positions "through direct petition to the Supreme Court" of Florida, does not provide an alternative "effective means of challenging such decision[s]," as Respondents' Supplemental Brief at 3 suggests. It would be incredibly burdensome for a dissenting member to file such a petition every time the Bar takes a legislative position. Moreover, *Hudson*, 475 U.S. at 307 n.20, "reject[ed] the Union's suggestion that the availability of ordinary judicial remedies is sufficient." While "*extraordinarily swift* judicial review • • • would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker," *id.* at 308 n.20 (emphasis added), the Florida Supreme Court did not finally dispose of the petition in *Frankel* until more than eight months after the Bar adopted the legislative positions challenged by that petition. *See* Supp. App. 1-3; Frankel *Amici* Brief 17a-18a. In the interim the Bar was permitted to continue spending dues for constitutionally nonchargeable purposes, even after the Florida Supreme Court ruled against the Bar. *See* Supp. App. at 10 & n.5. Thus, a direct petition to the Florida Supreme Court effectively provides no more than the "rebate" remedy condemned in *Hudson*, 475 U.S. at 305-06.



"[A]dequate justification for the advance reduction," *Hudson*, 475 U.S. at 309, includes a calculation that is based on "expenses during the preceding year" and "verification by an independent auditor," *id.* at 307 n.18; *see id.* at 310. The prior year's actual expenses must be used, because projected budgets are "too imprecise" to satisfy first-amendment concerns. *Lehnert v. Ferris Faculty Ass'n*, 643 F. Supp. 1306, 1328 (W.D. Mich. 1986), *aff'd in part, rev'd in part, on other grounds*, 881 F.2d 1388 (6th Cir. 1989), *aff'd in part, rev'd in part, on other grounds*, 111 S. Ct. 1950 (1991). Independent verification is necessary to provide an initial, reliable check on the self-interest of Bar officials in determining which expenses in the prior year were arguably chargeable under the criteria stated by the courts. *See Mitchell v. Los Angeles Unified School Dist.*, 739 F. Supp. 511, 514-16, *further proceedings*, 744 F. Supp. 938, 940-41 (C.D. Cal. 1990).

Second, even if state law limits all dues to the constitutionally chargeable amount, all members—"the potential objectors"—are entitled to adequate advance disclosure of the claimed factual and legal basis for the chargeability of the dues amount. *See Hudson*, 475 U.S. at 306-07. The Bar's scheme does not provide such disclosure. *See* Petitioner's Brief at 16-18; Reply Brief at 9-14. The Bar's assertion to members that all of its budgeted expenses are constitutionally chargeable self-evidently would not be "an adequate disclosure of the reasons why," *Hudson*, 475 U.S. at 307, objecting members are required to pay the dues amount it sets.

Third, as Respondents' Supplemental Brief at 3 concedes, "the Bar's decision as to what is or is not chargeable is not infallible." *See Florida Bar Re Schwarz*, 526 So. 2d 56, 57 n.2 (Fla. 1988). Indeed, *Frankel*'s rejection of the Bar's claim that lobbying on "children's issues" is chargeable demonstrates the likelihood that in calculating the dues amount the Bar will, out of self-interest or honest error, include as chargeable expenditures which are constitutionally nonchargeable. *See* Supp. App. 7-8.

*Frankel* does not, however, change the fact that under the Bar's procedure escrow does not occur until after the Bar has had

opportunities to spend dues on nonchargeable activities. Thus, the Bar's scheme still is constitutionally inadequate, because it "merely offers dissenters the possibility of a rebate" and "does not avoid the risk that dissenters' funds may be used temporarily for an improper purpose," *Hudson*, 475 U.S. at 305. *See* Petitioner's Brief at 21-22; Reply Brief at 5-6, 12-13.

Fourth, even if the Bar now "is prohibited from budgeting for non-chargeable purposes," Respondents' Supp. Brief at 4, this Court's decisions also prohibit it from requiring dissenters to make multiple objections "disput[ing] the Bar's conclusion that a given issue is chargeable," *id.* *See* Petitioner's Brief at 19-20; Reply Brief at 14-17.

A general objection is not "meaningless" after *Frankel*, as Respondents' Supplemental Brief at 4 erroneously claims. Under *Hudson*, 475 U.S. at 306-07, the Bar must disclose the basis for its conclusion that the amount of dues it sets at the beginning of each fiscal year is entirely chargeable. The member then has only "the burden of raising *an* objection" to the total. *Id.* at 306 & n.16 (emphasis added). He cannot be required to specify which of the Bar's expenditures he challenges in order to make that objection, even as a matter of pleading in litigation. *Abood*, 431 U.S. at 239 n.39, 241-42. But his general objection serves to initiate arbitration proceedings and trigger escrow of either his full dues or all but the portion that "an independent audit" verifies "that no dissenter could reasonably challenge." *Hudson*, 475 U.S. at 310.

Finally, the Bar's procedure contains a new constitutional defect as a result of *Frankel*. Before *Frankel*, when the Bar formulated its budget and adopted legislative positions, it only determined whether proposed expenditures were within the Bar's authority under state law. *See* Petition Appendix ("P.A.") 3a n.4, 25a-26a; Respondents' Brief at 6-8. The Board of Governor's response to a member's "objection to a particular position on a legislative issue" was the first time that it considered whether any of its expenditures were constitutionally chargeable or not under the first amendment as applied in *Keller*. *See* P.A. 6a n.8.



Now, the Bar claims, for the first time in this litigation, that constitutional chargeability will be taken into consideration by the Board of Governors when it sets the dues amount in adopting the budget and, presumably, again when it takes positions on specific legislative issues. *See* Respondents' Supp. Brief at 3-4. The Board of Governor's response to a member's objection thus is now the first step of the procedure for reviewing the constitutionality of its own determination of the dues amount, delaying impartial arbitration by at least 45 days. P.A. 6a n.8. However, an objector "is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Hudson*, 475 U.S. at 307. That requirement is not satisfied where an objector obtains review in impartial arbitration only after review by an internal body of the organization—in this case, the *same* internal body—which determined the compulsory fee in the first place. *Weaver v. University of Cincinnati*, 138 L.R.R.M. (BNA) 2174, 2180 (6th Cir. Aug. 26, 1991); *see Hudson*, 475 U.S. at 308.

## CONCLUSION

The decision of the Florida Supreme Court in *Frankel* has no significant impact on the questions presented in this case. The Court still should reverse the decision of the court of appeals and grant all relief requested by petitioner.

Respectfully submitted,

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